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| <b>J.G., Appellant</b>                          | ) |                                 |
|   | ) |                                 |
| <b>and</b>                                      | ) | <b>Docket No. 20-0285</b>       |
|   | ) | <b>Issued: December 2, 2020</b> |
| <b>DEPARTMENT OF JUSTICE, FEDERAL</b>           | ) |                                 |
| <b>BUREAU OF PRISONS, Pollock, LA, Employer</b> | ) |                                 |
|   | ) |                                 |

### Case Submitted on the Record

Before:  
CHRISTOPHER J. GODFREY, Deputy Chief Judge  
JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge

On November 18, 2019 appellant filed a timely appeal from an August 27, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

<sup>2</sup> The Board notes that, following the August 27, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## **ISSUE**

The issue is whether appellant has met his burden of proof to establish greater than one percent permanent impairment of his right lower extremity, for which he previously received a schedule award.

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</sup> The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On June 19, 2015 appellant, then a 32-year-old materials handler supervisor, filed a traumatic injury claim (Form CA-1) alleging that on that date he twisted his right ankle and injured his right Achilles tendon and right big toe while in the performance of duty. He stopped work on June 19, 2015 and returned to modified employment on July 31, 2015. OWCP accepted the claim for tenosynovitis of the right foot and ankle.

A magnetic resonance imaging (MRI) scan of appellant's right foot obtained on August 26, 2015 revealed a fragmented sesamoid bone.

Appellant, on September 14, 2016, filed a claim for a schedule award (Form CA-7).

Appellant submitted a December 1, 2016 impairment evaluation, performed by an occupational therapist and cosigned by Dr. Angela Mayeux-Herbert, a Board-certified orthopedic surgeon. Dr. Mayeux-Herbert discussed his complaints of mild right great toe discomfort and pain in his right foot with extensive standing. She measured normal range of motion of the right ankle. Dr. Mayeux-Herbert advised that appellant had hyperextension of the right great toe at the MTP joint and with flexion at the interphalangeal joint. She identified the class of diagnosis (CDX) as 1 for a fragmented sesamoid bone with right great toe pain and a mild motion deficit, which she found yielded two percent impairment of the right lower extremity. Dr. Mayeux-Herbert applied a grade modifier for functional history (GMFH) of one, a grade modifier for physical examination (GMPE) of one, and a grade modifier for clinical studies (GMCS) of one, noting that an MRI scan study had verified the sesamoid bone fragmentation. She found no adjustment from the default value and opined that appellant had two percent right lower extremity permanent impairment.

On July 28, 2017 Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), reviewed the findings of Dr. Mayeux-Herbert. He identified CDX of 1 for a sesamoid fracture using the foot/ankle regional grid set forth at Table 16-2 on page 505 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),<sup>4</sup> which yielded a default value of one percent. The DMA found that Dr. Mayeux-Herbert had applied a GMFH and GMPE of one, and a GMCS of two. He applied the net adjustment formula, (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX), or (1-1) + (1-1)

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<sup>3</sup> Docket No. 19-0369 (issued June 11, 2019).

<sup>4</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

+ (2-1) to find a net adjustment of one, which he found moved the default adjustment over one for two percent impairment. The DMA recommended, however, a permanent impairment rating of one percent for the right lower extremity and opined that appellant had reached maximum medical improvement on December 1, 2016.

In a letter dated October 24, 2017, OWCP requested that appellant's attending physician review and comment on the DMA's findings.

In a November 15, 2017 response, Dr. Mayeux-Herbert advised that her prior determination had not altered. She enclosed a February 8, 2017 report in which she reviewed appellant's impairment rating and noted that he had two percent permanent impairment of the right lower extremity.

By decision dated November 13, 2018, OWCP granted appellant a schedule award for one percent permanent impairment of the right lower extremity. The period of the award ran for 2.88 weeks from December 1 to 21, 2016.

Appellant appealed to the Board. By decision dated June 11, 2019, the Board set aside the November 13, 2018 decision. The Board noted that both Dr. Mayeux-Herbert and the DMA had applied a GMCS even though the diagnostic testing results had been used to identify the diagnosis. The Board further found that the DMA had failed to explain his finding of a GMFH of one in concluding that appellant had one percent permanent impairment of the right lower extremity. The Board remanded the case for OWCP to obtain a supplemental report from the DMA.

On July 27, 2019 the DMA again identified a CDX of 1 for a sesamoid fracture under Table 16-2 on page 501, which yielded a default value of one percent. He applied GMFH and GMPE of one, noting that a GMCS was not applicable. The DMA advised that Dr. Mayeux-Herbert had erred in applying the net adjustment formula and finding an adjustment of one when the value after the net adjustment was zero. He advised that appellant had no adjustment from the default value of one percent. The DMA indicated that Dr. Mayeux-Herbert had also found a GMFH of one.

By decision dated August 27, 2019, OWCP granted appellant a schedule award for one percent permanent impairment of the right lower extremity. The period of the award ran for 2.88 weeks from December 1 to 21, 2016.

### **LEGAL PRECEDENT**

The schedule award provisions of FECA,<sup>5</sup> and its implementing federal regulations,<sup>6</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such a determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized

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<sup>5</sup> *Supra* note 1.

<sup>6</sup> 20 C.F.R. § 10.404.

the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*, published in 2009.<sup>7</sup> The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.<sup>8</sup>

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning Disability and Health (ICF).<sup>9</sup> Under the sixth edition, the evaluator identifies the impairment CDX, which is then adjusted by grade modifiers based on GMFH, GMPE, and GMCS.<sup>10</sup> The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>11</sup> Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.<sup>12</sup>

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.<sup>13</sup>

### ANALYSIS

The Board finds that this case is not in posture for decision.

In support of his claim, appellant submitted a December 1, 2016 impairment evaluation report from Dr. Mayeux-Herbert. Dr. Mayeux-Herbert identified the CDX as 1 for a fragmented sesamoid bone with right great toe pain and a mild motion deficit, which she found yielded two percent impairment of the right lower extremity. She applied grade modifiers of one for each category, which she found yielded no adjustment from the default category. Dr. Mayeux-Herbert noted that a right foot MRI scan had verified the sesamoid bone fragmentation. A DMA reviewed her findings and found one percent permanent impairment of the right lower extremity.

On prior appeal, the Board remanded the case for the DMA to clarify his opinion. In a report dated July 27, 2019, the DMA noted that both he and Dr. Mayeux-Herbert had applied grade

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<sup>7</sup> For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides* (6<sup>th</sup> ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also id.* at Chapter 3.700, Exhibit 1 (January 2010).

<sup>8</sup> *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>9</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009), p.3, section 1.3, International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

<sup>10</sup> *Id.* at 494-531.

<sup>11</sup> *Id.* at 411.

<sup>12</sup> *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

<sup>13</sup> *See supra* note 7 at Chapter 2.808.6(f) (March 2017).

modifiers of one for GMFH and GMPE. He advised that she had erred in applying the net adjustment formula and finding an adjustment of one when the value after the net adjustment was zero. The DMA concluded that appellant had one percent permanent impairment of the right lower extremity.

OWCP accepted tenosynovitis of the right foot and ankle. Both Dr. Mayeux-Herbert and the DMA rated the extent of appellant's permanent impairment using the diagnosis of a nondisplaced sesamoid bone, which yields a default value of one under Table 15-5 on page 505. The August 26, 2015 MRI scan of appellant's right foot, however, showed a fragmented sesamoid bone, which yields a default value of five percent rather than one percent according to Table 15-5. Neither Dr. Mayeux-Herbert nor the DMA explained their use of a nondisplaced sesamoid bone rather than fragmented sesamoid bone as the CDX for impairment rating purposes.

Proceedings under FECA are not adversarial in nature and, while the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.<sup>14</sup> The case will be remanded for OWCP to prepare an updated statement of accepted facts, including the results of the MRI scan, and to refer appellant to an appropriate specialist for an impairment evaluation to determine the extent of his right lower extremity permanent impairment. After this and any further development deemed necessary, it should issue a *de novo* decision.

### **CONCLUSION**

The Board finds that this case is not in posture for decision.

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<sup>14</sup> *J.O.*, Docket No. 17-1156 (issued September 13, 2017).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 27, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: December 2, 2020  
Washington, DC

Christopher J. Godfrey, Deputy Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board